United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA :

Appellee, :

-v- :

MICHAEL SADOWSKI, :

Appellant. :

:

----------X

76-1097

BRIEF FOR APPELLANT MICHAEL SADOWSKI

Appeal from A Judgment
of Conviction in the United
States District Court for the
Eastern District of New York

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UNITED STATES OF AMERICA :

Appellee, :

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BRIEF FOR APPELLANT MICHAEL SADOWSKI

Michael Sadowski appeals from his conviction on February 20, 1976, in the United States District Court for the Eastern District of New York (Costantino, J.) upon a jury verdict on one count of robbing a federally insured bank and assaulting and placing lives in jeopardy during the robbery. 18 U.S.C. 2113(d). His sentence was ten years. Counsel on this appeal is assigned under the CJA.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in refusing to sever Sadowski's case from that of his co-defendant, Robert DiGiovanni. Sadowski's theory was that DiGiovanni had committed the robbery in question and others pursuant to a common scheme of which he was not part. The court below prevented

Sadowski from exploring the other robberies because of the prejudice to DiGiovanni, rather than severing as required by DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962) and other authorities.

2. Whether the district court erred in admitting evidence of Sadowski's subsequent plans to execute another bank robbery. The evidence was inflammatory and prejudicial and violated Sadowski's rights for essentially the reasons stated in United States v. Falley, 489 F.2d 33 (2d Cir. 1973). The district court erred further in failing to give an instruction on the limited purpose for which the proof could come in, as required by United States v. Papadakis, 510 F.2d 287 (2d Cir. 1975).

3. Whether the district court erred in refusing to declare a mistrial in view of the Government's extensive comment in summation on Sadowski's failure to cross-examine certain witnesses.

4. Whether the district court improperly restricted the scope of cross-examination of an important Government witness, Sonia Karakitis.*

* One of Sadowski's co-defendants was Patrick Doughtery. The transcript spells his name both that way and "Dougherty". We use the first way throughout.

STATEMENT OF FACTS

The Robbery

On July 2 1975, three men held up a branch of the National Bank of North America at 465 Kings Highway, Brooklyn. They escaped in a blue car (54)* driven by a fourth. Two carried pistols and the third a sawed-off shotgun (45).

The Government charged Michael Grafman, Robert DiGiovanni, Patrick Doughtery and Sadowski with the crime. Grafman was the principal witness for the Government and the key to its case. During that month he had committed not only the July 2nd robbery but three subsequent bank robberies as well (107), all with DiGiovanni.

The idea for the July 2nd robbery originated with Grafman and DiGiovanni. These two made the decision to carry it out, and were at the center of the execution and planning (111-12). They solicited Doughtery's assistance (112) and he in turn brought in Sadowski (114). Originally Doughtery did not want to go on the robbery itself although he was willing to help with the planning. Since four people were needed (two to go over the counter, one to stand at the door, and one to drive the getaway car), Sadowski arranged for Jose Torres to join them (123).

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* Numbered references are to the transcript of trial unless otherwise specified. We will give both record and joint appendix references where applicable, the latter designated JA. Our statement of facts takes the proof most favorable to the Government.

Doughtery later changed his mind and went in place of Torres as the driver (127)*. Grafman and DiGiovanni were the two who went over the counter, and Sadowski stood at the door (135-37). They obtained $15,549.89 which was supposed to be split in equal shares (388). However, the four went separate ways before the money was divided and Grafman did not receive his share until later (145-46), and then only $1900 since DiGiovanni lied to Grafman about how much was obtained (394-95).

The Florida Calls About Another Robbery

After the robbery, Sadowski went to Florida (498). He called Grafman from there, said he had no money and asked if Grafman was interested in doing another robbery (199-200). Grafman responded that he and DiGiovanni were planning one then (200, 504), and offered to send money to have him come to New York to participate in it (504, 505). Sadowski also talked to DiGiovanni about the new robbery (838-42). The money was never sent and Sadowski never came to New York. He was ultimately arrested in Florida (989).

Sherri Lessner, Torres, the Surveillance Photos and the Address Book

There were four other aspects to the Government's case against Sadowski:

* Since the jury acquitted Doughtery, for purposes of this appeal he cannot be considered the driver. In this statement of facts, however, we will treat Doughtery as Grafman treated him in his testimony.

(a) Sherri Lessner, a cocktail waitress, testified that she met Sadowski in Florida, went with him and two others to dinner, and saw him pay with a large bill, either a hundred or two fifties taken from a stack of money three-quarters of an inch thick (617-18). Sadowski moved into her apartment, paying her $50.00 per week (618).

(b) The Government produced Jose Torres. He told about a meeting with Sadowski, Grafman and DiGiovanni, arranged by Sadowski, with Doughtery also present, where a bank was mentioned (643). Torres saw the bank, agreed to join (646), but then changed his mind and told Sadowski he was out (647).

(c) Surveillance photographs had been taken at the bank. The Government introduced one with Sadowski, but his face was partially concealed by his lapel and a handkerchief, and identification from it was difficult. To aid the identification, the Government introduced a picture of Sadowski taken at his arraignment in August, 1975 (G. Ex. 26, 1071).

(d) The Government introduced an address book of Sadowski's taken on his arrest in Florida (G. Ex. 22A, B, 1017). The address book had on one page Doughtery's address and telephone number, another number in between and the notation at the bottom about a six-shooter (1002-04) which the Government urged was connected to Doughtery (1005). The book had in addition the telephone numbers of Grafman, DiGiovanni, Torres, Doughtery and Sherri

Lessner (1009). The Government also introduced statements of Sadowski upon his arrest that he had had conversations with Grafman and DiGiovanni (994-96) although not about robbing a bank.

Indictment and Trial: The Conflict Between Sadowski and DiGiovanni

The Government filed Indictment 75 Cr. 608 on August 4, 1975. It joined together four defendants -- Grafman, DiGiovanni, Sadowski and Stanley Loskocinski, Jr., and four different robberies: July 2, July 17, July 18 and July 24.

Counts 1 and 2 covered the July 2 robbery. Count 1 charged Grafman, DiGiovanni and Sadowski with the robbery itself (18 U.S.C. 2113(a)), and Count 2 with the robbery aggravated by assault and placing lives in jeopardy by use of a dangerous weapon (18 U.S.C. 2113(d)). The indictment further charged that Grafman and DiGiovanni had committed the July 17th robbery, and Grafman, DiGiovanni and Loskocinski the July 18th and 24th robberies.

Trial commenced December 15, 1975, solely on the July 2 holdup.* A separate indictment against Doughtery on that was consolidated for trial purposes. It was apparent from the outset that the defense of Sadowski and that of DiGiovanni were in direct conflict and that preservation of the rights of one would jeopardize the rights of the other (62, JA38). Sadowski's theory

* Prior to this trial, DiGiovanni was separately tried and convicted for two of the other robberies. His appeal covers those robberies as well.

was that Grafman and DiGiovanni -- long-standing friends -- had planned and executed the series of robberies of which the July 2 robbery was only one; and that Grafman, although he cooperated with the Government, had shielded some of their confederates by implicating others, to wit, Sadowski. To present this defense properly, Sadowski had to explore the details of the three other robberies on cross-examination of Grafman and otherwise (62, JA38). This, however, would create problems for DiGiovanni since the jury would then hear about his involvement in other crimes (67, JA39). The district court opted to preserve DiGiovanni's rights. Except for certain limited areas, it foreclosed Sadowski from inquiry into the other robberies in order to avoid prejudice to DiGiovanni (E.g., 68-69, 71-72, JA40-43). Repeated motions of both Sadowski and DiGiovanni for severance were denied.

The jury returned guilty verdicts against DiGiovanni and Sadowski. The verdicts were only on Count 2, the armed robbery count. The court had instructed the jury to consider that count first, and to go no further if it found defendants guilty of that charge (1278, JA37). Prince v. United States, 352 U.S. 322 (1957).

The jury acquitted Doughtery. Doughtery had not presented an affirmative case to contradict Grafman. The jury simply refused to credit his testimony about Doughtery's involvement.

ARGUMENT

POINT I

THE DEFENSES OF DiGIOVANNI AND SADOWSKI WERE IN DIRECT CONFLICT. THE DISTRICT COURT ERRED IN CIRCUMSCRIBING SADOWSKI'S DEFENSE RATHER THAN GRANTING A SEVERANCE.

It is impossible to understand why the district court did not sever Sadowski from DiGiovanni pursuant to F.R.Crim.P. 14. It was clear enough that if Sadowski pursued the other robberies, DiGiovanni would be unfairly prejudiced. The Government recognized this and announced right away that it did not intend to go into the other holdups (73, JA44). But protection of DeGiovanni from prejudice could not be at the expense of Sadowski. The Grafman-DiGiovanni relationship was at the heart of his defense. The district court could not, as it did, take it away from him.*

The case for severance was overwhelming. First, the positions were squarely antagonistic. If Sadowski could examine on the other crimes, DiGiovanni suffered. If he couldn't, Sadowski improperly was deprived of his defense.

Second, there was no middle ground. Letting the evidence in with limiting instructions was no alternative because no effective limiting instructions could be framed. That is why the court kept most of the evidence out altogether.

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* We could phrase the court's error as an improper curtailment of Sadowski's defense. We prefer, however, to deal with it in terms of the remedy the court should have adopted out of fairness to all concerned viz, severance.

Finally, neither the Government nor the court had a real interest in trying Sadowski and DiGiovanni together. The trial was a short one. The whole record was only 1300 pages, and so much of that was taken up with sidebar colloquy between counsel and the court on the severance motions and other problems related to the joint trials.* The Government's principal witness was Grafman, and he was available for separate trials. Indeed he testified for the Government at DiGiovanni's separate trial on the July 17 and 24 robberies. There was very little overlap between the other witnesses. Those who had something to contribute on Sadowski, e.g., Sherri Lessner, had little or nothing to say about DiGiovanni, and vice versa as to the witnesses on DiGiovanni. And most telling of all is that the Government didn't even need to try DiGiovanni for the July 2 robbery. It had already obtained his conviction on the July 18 and July 24 robberies, and ultimately DiGiovanni was to receive one concurrent fifteen-year sentence for all.

DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962) and United States v. Johnson, 478 F.2d 1129 (5th Cir. 1973) control. In DeLuna, two defendants, Gomez and DeLuna, were jointly tried for importing narcotics. Each protested his own innocence and blamed the other. Gomez testified, DeLuna didn't. In summation, Gomez' attorney dwelt extensively on DeLuna's failure

* At one point the court kept the jury waiting two hours while these issues were discussed (195, JA47).

to testify, something the Government could not have done. The Court held that Gomez was permitted to draw inferences from DeLuna's failure to testify; that DeLuna was entitled to a trial free from such inferences, whether drawn by the Government or a co-defendant; and that the district court, therefore, should have severed the cases and tried each defendant separately.

This reasoning is directly in point here.

In United States v. Johnson, supra, the two defendants, Smith and Johnson, were accused of passing counterfeit notes. Smith's defense was to cast all the blame on Johnson. He was, as the Court put it, "the government's best witness against Johnson". 478 F.2d at 1133. There were only two defendants "and it would not have been very time consuming, but entirely practicable, to have accorded them separate trials". 478 F.2d at 1134. Severance should have been granted, held the Court, because Smith's defense prejudiced Johnson. The case comes out the same way if, as here, the Court had curtailed Smith's defense to save prejudice to his co-defendant Johnson. See also United States v. Barrera, 386 F.2d 333, 339 (2d Cir. 1973) ("close case" for severance when one defendant's insanity defense takes point of view that other defendants had participated in the conspiracy charged); United States v. White, 482 F.2d 485, 488 (4th Cir. 1973) (dictum: severance when one defendant is

"trying to throw the mantle of guilt upon any other defendant"); United States v. Jenkins, 496 F.2d 57 (2d Cir. 1974) (dictum: severance when each of two defendants is implicating the other as the "floor-man" during a bank robbery); United States v. Nelson, 468 F.2d 912 (5th Cir. 1972) (dictum: severance when antagonistic defenses in that one defendant claims entrapment).

The district court's error in refusing to sever was crucial for Sadowski. Apart from Grafman, the Government's evidence was mainly circumstantial (150, JA53). It was not enough to convict, and that included the surveillance photographs, as the Government admitted (5).* The conviction, as with Doughtery about whom there was an equal amount of circumstantial evidence, stood or fell on whether the jury credited Grafman.

Grafman had repeatedly shown that his word was not to be trusted. He lied in pretrial statements to the F.B.I. about the ownership of the getaway car (366). He lied about when he had been introduced to Stan Loskocinski, an accomplice in two

* The Assistant stated (5-6):

> "Mr. DiCarlo's client . . . covered his face partially with his lapel or with a handkerchief.
>
> "In view of the partial covering his face, I do not think this trial is going to turn on eye-witness identification.
>
> * * *
>
> "Either the direct recollection of the witnesses . . . or the display of the photographs."

other robberies (368-70); he lied about meeting a friend of Stan's (371), about receiving instructions from this friend to go over the counter (371), about getting a stocking from Stan's friend (372), about Stan's waiting in the car while the robbery took place (372), about receiving money from Stan (372), and about robbing only the North America Bank (375). He admitted that all of his July 26 statement on the robbery was lies (Sadowski Ex. B, 378). At first he admitted to robbing only one bank. He then admitted the others (379). He lied about the amount he received on the July 2 robbery (395). He lied before the Grand Jury as to the proceeds received from the four robberies (417), and he did not even mention Jose Torres' involvement until November, just before the trial (1108). His testimony for the Government was saving him from a long prison sentence.

It was imperative, therefore, that Sadowski be accorded the fullest cross-examination of Grafman about all the events in July, including the details of the other robberies and the numerous respects in which he had lied about them throughout the proceedings. The district court's ruling precluded this. Its unwarranted restrictions (we set forth just a few of them at Tr. 267-69, 408, JA48-51), which arose out of its refusal to grant a severance, took away from Sadowski an equal chance at

the acquittal achieved by Doughtery, and clearly compels reversal of his conviction.*

POINT II

THE DISTRICT COURT SHOULD NOT HAVE PERMITTED EVIDENCE OF SADOWSKI'S DISCUSSION OF A SUBSEQUENT ROBBERY. EVEN IF ADMISSIBLE, THE COURT ERRED IN NOT GIVING A LIMITING INSTRUCTION.

Federal Rules of Evidence 404(b) permits evidence of other crimes to evince motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The same rule prohibits such evidence to prove character in order to show that a person acted in conformity therewith -- stating by rule this Circuit's decisional law that evidence of other crimes cannot come in solely to show bad character. United States v. Papadakis, 510 F.2d 287 (2d Cir. 1975); United States v. Torres, 519 F.2d 723 (2d Cir. 1975); United States v. Bermudez, 526 F.2d 89 (2d Cir. 1975); United States v. Miranda, 526 F.2d 1319 (2d Cir. 1975).

However, evidence otherwise within Rule 404(b) must be kept out when its potential prejudice outweighs its provative

* We are aware of DiGiovanni's argument that he was prejudiced because the district court permitted Sadowski to cross-examine to some extent on the other robberies. The district court's basic ruling, however, was that no examination on the other robberies was permitted, such examination was repeatedly frustrated and precluded, and such evidence as did come in, although it might have prejudiced DiGiovanni, was not anywhere close to the scope of examination Sadowski should have been accorded.

worth (Evidentiary Rule 403), United States v. Torres, 519 F.2d at 727. For example, in United States v. Falley, 489 F.2d 33 (2d Cir. 1973) the Government built its case of illegal importation of narcotics around the testimony of co-conspirators. It had no physical evidence of the particular crimes charged. It did, however, introduce into evidence a suitcase of drugs for delivery to one defendant. The other three had nothing to do with it, and the transaction as to that suitcase was not within the indictment.

This Court reversed. The suitcase might have been relevant to buttress the testimony of the co-conspirator witness that he had imported drugs, but its relevance was outweighed by the prejudicial impact upon the jury, prejudice which could not be cured by limiting instructions.

The court below should not have admitted evidence of Sadowski's discussion from Florida of another robbery (149-51, 175, JA52-55). The Government's only purpose, as in Falley, was to bolster its weak co-conspirator Grafman with physical and other evidence which a jury could more readily accept, evidence, however, which was inflammatory and prejudicial. Thus, based on the ruling that planning of another robbery was admissible, the Government was able to elicit testimony from Soria Karakitis, a young girl with whom DiGiovanni lived, that at DiGiovanni's instructions she wrote Sadowski's Florida number on a Con Edison envelope (834-36, G.Ex. 17); that after dialing

that number on a Friday, DiGiovanni told the party on the other end (to wit, Sadowski) that he would not pay the fare from Florida for the weekend, but that after Monday Sadowski would have enough money to pay his own way home; and that Sadowski and DiGiovanni had talked about guns (838-42).

Even if this inflammatory and prejudicial evidence was otherwise admissible, United States v. Papadakis, 510 F.2d at 295, and United States v. Klein, 340 F.2d 547, 549 (2d Cir. 1965) make perfectly clear that reversible error is present unless the trial court spells out the limited purpose for which the evidence is admitted. No such instruction was given here.*

POINT III

THE ASSISTANT IMPROPERLY COMMENTED ON THE NATURE AND EXTENT OF DEFENDANTS' CROSS-EXAMINATION, SHIFTING THE BURDEN OF PROOF TO DEFENDANTS.

Defendant's silence at trial is guaranteed. He need not testify himself. He need not present an affirmative defense. He need not cross-examine the Government's witnesses. The Government is not entitled to have the jury draw adverse inferences from defendant's silence in these regards. DeLuna v. United States, supra.

At this trial the Government sought to do just that. The worst aspect concerned Sherri Lessner who had testified about

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* The court's charge mentioned it, but that was much too late to have the required limiting effect for the jury.

the wad of bills Sadowski flashed around in Florida. Sadowski had also moved in with her (990) which, the Government argued, was an attempt to avoid detection (1179). She gave evidence only against Sadowski, but Sadowski's counsel did not cross-examine her.

The Assistant highlighted that failure in his summation, Tr. 1192-93, JA59-60:

> "What about Sherri Lessner? What cross-examination was there of her? Was no cross-examination necessary about the three-quarter of an inch stack of bills with 50's and 100's showing?"

He continued (Ibid):

> "Is there some doubt as to what was meant by the word 'stack'? Is there any doubt? Did Lessner mean a roll or a crumpled pile of bills? If that is the case, wouldn't it have been easier to clarify that on cross-examination and bring out the truth if what we are really talking about is not a three-quarter of an inch stack?" (Emphasis supplied.)

There were similar comments about other witnesses. The Assistant asked about testimony of Torres (1190, JA57):

> "Why didn't Mr. Lombardo, Mr. Le Moles and Mr. De Carlo examine those five so-called stories [of Torres] in depth? Ask yourself this: if anywhere in the statements that Jose Torres made there was a shred of a statement that was favorable or showed the innocence of any of the three defendants in this case, would Mr. De Carlo or Mr. Le Moles, Mr. Lombardo have let it pass?"

He then remarked about how "short" was Doughtery's cross-examination of Torres, and wanted to know "why didn't Mr. Le Moles go

after Jose Torres hammer and tongs?" (1191, JA58). Torres, of course, also implicated Sadowski.

The thrust of the Assistant's remarks is unmistakeable. In plain violation of the rule that the burden of proving guilt beyond a reasonable doubt always remains with the Government and never shifts to defendants, the Assistant in effect shifted that burden and urged the jury to convict because defendants had failed to meet it. The error was a major one, pervaded his summation, and entitles Sadowski to a reversal.

POINT IV

THE DISTRICT COURT IMPROPERLY RESTRICTED CROSS-EXAMINATION OF SONIA KARAKITIS.

Several weeks before she testified for the Government with respect to Sadowski's planning a subsequent robbery with DiGiovanni, Sonia Karakitis had reached an agreement with the Government, reduced to writing, whereby the Government would not prosecute her in return for her cooperation. At trial, however, the district court restricted Sadowski's cross-examination into various details of her involvement in the series of bank robberies in the indictment on the ground that she was entitled not to incriminate herself under the Fifth Amendment. The immunity granted by the Government, held the court, went only to

prosecuting her as an accessory after the fact or for misprision of a felony based on her aid and assistance to DiGiovanni following the robberies. The court precluded examination into facts which bore on whether she was also a principal, for example, by having scouted one of the banks in advance of the holdup (935-40, JA61-67).

This was error. Clearly the court could not permit direct testimony on events relating to the July 2 robbery and thereafter restrict cross-examination into those very same events on the ground that the answers might incriminate her. The error is important because the Karakitis testimony was corroborative of Grafman, and the issue of Grafman's credibility was central to the case.

CONCLUSION

Based on the foregoing, this Court should reverse the conviction below, directing further that on any re-trial the case of defendant Sadowski be severed from that of defendant DiGiovanni.

Respectfully submitted,

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